IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

WP(C).No. 29596 of 2007(W)

E.P. 56/03 IN OS.144/2001 of SUB COURT, THIRUVALLA
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PETITIONERS:
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1. **MARYKUTTY PHILIP, W/O. PHILIP PHILIP, KANNAMALA VEEDU, NEDUMKUNNAM, KARUKACHAL.**

2. **ROSH PHILIP, S/O. PHILIP PHILIP, KANNAMALA VEEDU, NEDUMKUNNAM, KARUKACHAL.**

3. **RONE PHILIP, S/O. PHILIP PHILIP, KANNAMALA VEEDU, NEDUMKUNNAM, KARUKACHAL.**

4. **ROBIN PHILIP, S/O. PHILIP PHILIP, KANNAMALA VEEDU, NEDUMKUNNAM, KARUKACHAL.**

BY ADV. SRI.S.SUBHASH CHAND

RESPONDENT:

VARGHESE ABRAHAM, S/O. ABRAHAM, PALLIKKAL VEEDU, EZHUMATTOOR MURI, EZHUMATTOOR VILLAGE, REPRESENTED BY POWER OF ATTORNEY HOLDER, K.G.UNNIKRISHNAN NAIR, THYPARAMBIL VEEDU, MALLAPPALLY MURI, MALLAPPALLY VILLAGE, MALLAPPALLY TALUK.

BY ABRAHAM SAMSOM

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 22/11/2007, ALONG WITH CRP NO. 862 OF 2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N. KRISHNAN, J.

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W.P.C. NO. 29596 OF 2007

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C.R.P. 862 OF 2007

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Dated this the 22nd day of November, 2007.

J U D G M E N T

The CRP is preferred against the order of the Subordinate Judge, Thiruvalla in E.P.56/03 in O.S.144/01. WPC 29596/07 is filed by the writ petitioner therein contending that for the implementation of the decree for specific performance the methodology to be adopted is to move an application on the original side under Section 28(3) of the Specific Relief Act and that the execution petition is not maintainable. The brief facts necessary for the disposal of the matter is stated as follows.

2. The execution petition is one for executing a decree in O.S.144/01. As per the decree dated 12.8.03, a decree for specific performance was granted. The first defendant died after the decree and the 2nd defendant died before the decree. The additional judgment debtors 3 to 6

were then impleaded as the legal representatives of the deceased first judgment debtor. The said additional judgment debtors had raised two fold contentions, one is to the effect that an execution petition is not maintainable for enforcing a decree for specific performance and secondly that the property is not properly identifiable and therefore the property cannot be delivered to. The Court below after examination of the evidence available in the case held that the property is identifiable and therefore held that the decree holder is entitled to get execution, allowed in his favour as per the decree passed in this case.

3. The first point to be considered in both these cases are regarding the maintainability of an execution petition. The learned counsel for the revision petitioner as well as the writ petitioner strongly contends before me that under Section 28(3) of the Specific Relief Act the methodology of implementation of the decree of the Court for specific performance is enunciated and therefore if at all any remedy is there, it is to move the Court which passed

the decree on the original side under Section 28(3) for implementation of the decree.

4. On the other hand the learned counsel for the decree holder would contend before me that Section 28(3) does not completely bar the remedy by way of execution and as far as Order 21 Rule 32 and 34 are concerned it is still retained in the CPC intact and therefore execution can be done by the same Court.

5. The learned counsel for the writ petitioner had drawn my attention to the decision of the Apex Court reported in ***Ramankutty Guptan v. Avara (1994 (1) KLT 453)***. The facts of the case would reveal that the appellant/judgment debtor filed a petition in the executing Court to rescind the contract dated 16th January, 1976 on the plea that the plaintiff had committed default in depositing the balance consideration of Rs.4,351/-. The Apex Court therein held that the direction to rescind the contract under the Specific Relief Act is covered by S.28(1) of the Act and an application on that behalf has to be made in the same

Court in which the decree is made. Therefore, the Court held that in such a case the party has to move an application on the original side of the suit for rescission of the contract and held accordingly. So far as Section 28(3) is concerned it is correct to state that the party can move an application under Section 28(3)for satisfaction of the right mentioned in that sub section. The difference between Section 28(1) and 28(3) has also to be borne in mind. Section 28(1) specifically deal with a situation of rescission of contract. It is not provided elsewhere in any other statute and therefore it has to be held that Section 28(1) has to be understood by the provisions in that clause itself which indicates that it must be done in the very same suit.

6. The next decision referred to by the learned counsel is that the decision reported in ***Joseph v. Joseph (1997 (1) KLT 663)***. It was a case where an application was filed under Section 28(3). It was contended that it has to be filed on the execution side. Then the Court held that the application is maintainable in the same suit under

Section 28(3) of the Act and therefore it has to be tried in that way. In this decision also the Court has not considered about the impact or purport of Order 21 Rule 32(5) CPC or Order 21 Rule 34 CPC.

7. Now, it is profitable to refer to Order 21 Rule 32 (5). Order 21 Rule 32(5) is a specific provision dealing with a decree for specific performance of a contract. Therefore, unlike the remedy contemplated under Section 28(1), here is a parallel remedy provided to the party under Order 21 Rule 32(5) and Order 21 Rule 34 CPC . I had also the occasion to go through the Commentaries of Specific Relief Act by Sarkar 15th Edition 2005 at page 353 which deals with the commentaries on Section 28. The learned author says that,

> "Curiously, however, Or.21 R.32(5) has not been repealed or amended, so that the remedy by way of execution will also be open to the decree holder, purchaser or lessee and it will lie at his option either to apply in the suit or to apply for execution of the decree."

Therefore, the indication of the author is regarding the remedies provided under both the enactments. It is also profitable to refer to the decision of the Apex Court reported in ***H.I. Trust v. Haridas Mundhra (AIR 1972 SC 1826)***. The Apex Court therein considered about the question of provisions of Order 21 Rule 32 in relation to the provisions of the Specific Relief Act. The Apex Court held that the execution can only be in the manner prescribed under Rule 32. In the decision reported in ***Pratibha Singh v. Shanti Devi Prasad (AIR 2003 SC 643)*** though the question did not arise directly for consideration the Court was considering the question regarding the executability under Order 21 Rule 34(2) of CPC. So, from the decision referred to above and the relevant provisions I am of the view that there is no bar for a party to move an application under Order 21 for execution of a decree for specific performance of the contract in the light of specific provisions contained therein and it appears that Section 28(3) also can be resorted to by a party and therefore the contention of the learned counsel for the

writ petitioner/civil revision petitioner that an execution petition is not maintainable cannot be accepted.

8. Learned counsel for the writ petitioner had also brought to my attention the decisions of the Apex Court reported in ***Kalpana Saraswathi v. Somasundaram Chettiar (1980 (1) SCC 630), Kumar Dhirendra Mullick v. Tivoli Park Apartments (P) Ltd. (JT 2004 (9) SC 446), Chanda v. Rattni (AIR 2007 SC 1514), Padmaja v. Sajeev (2006 (1) KLT 265), Aitha Dubba Rajam v. Aitha Pochaiah(AIR 2007 AP 133), Anandavally v. Kanda Kunju Natesan (1992 (2) KLJ 824*** and objects and reasons to Section 28. In the decisions referred to above, other than in Andra Pradesh and of this Court in 1992 (2)KLJ 824, it is laid down that a petition under Section 28 (3) of the Act is perfectly maintainable on the original side of the suit itself. There cannot be any quarrel about the proposition in the light of the authoritative pronouncements of the Apex Court. But the point for determination here as discussed by me earlier is whether by introduction of Section

28(3) the remedy provided under the CPC is taken away. The two decisions of the Andra Pradesh High Court and the Kerala High Court would show that the learned Judges have taken the view that the execution petition can be filed as well. The learned counsel had drawn my attention to the objects and reasons and it is specifically stated that,

> "We recommended, that complete relief in terms of the decree in a suit for specific performance shall be available by application in the suit itself, without having to resort to separate execution proceedings and that appropriate provisions should be made in the Code of Civil Procedure, enabling such applications to be made and orders there on and also for appeals."

So, the Law Commission has recommended for incorporating an independent provision and the Law Commission was totally conscious of the presence of provisions under the Code of Civil Procedure. Even though the CPC had undergone amendment in 2002, the said provision is still retained and therefore I feel that one cannot hold that Section 28(3)

debars a party from filing an application under Order 21 Rule 32 and 34 of the CPC.

9. Therefore, on an analysis of all these materials, I hold that Section 28(1)(2) and (3) are applicable and there is absolutely no legal bar for a party to proceed under Section 28(3) and for fulfillment of a specific performance of a decree. But, just because a provision is provided under Section 28(3), in my view, it will militate against applying for execution under Order 21 Rule 32 to 35 or Order 21 Rule 34 and therefore just because an application is filed on the execution side it need not be dismissed especially when the original as well as execution Court are one and the same and the salutary principle that technicality shall not defeat justice has to be borne in mind in these types of cases.

10. The next question is regarding the executability of the decree. The decree is one for specific performance of a contract. The original defendant contested the case and it ended in a decree. There was a specific issue raised as issue No.1 wherein the Court considered whether the plaint

schedule description is not correct. The Court while answering issue No.1 held that the plaint schedule description is correct. It is also to be held that the said decree has become final and so it is binding on the parties. Now, the legal representatives at the stage of the execution wanted to contend for the position that the properties are not properly identifiable and therefore the decree is not acceptable and therefore such a contention can be raised under Section 47 of the CPC. But the learned counsel appearing for the decree holder in the matter has brought to my notice to a decision of this Court to the effect that even in the very same proceeding when a matter is concluded by a finding of the Court which has attained finality it will have the effect of resjudicata on the very same proceedings. So far as this case is concerned, here the defendant in the suit has categorically challenged the correctness of the description of the plaint schedule property and the Court after an enquiry had entered into a definite finding regarding the correctness of the identity. Judgment debtors' legal representatives who

have just stepped into the shoes of the original judgment debtor cannot have a better right or better say in those cases. Further, now, what the Court has decided is regarding the executability of the decree. The identification of the property is also concluded by the decision of the Court on the original side. So, when the document is executed and the decree holder moves for possession of property, then as per the description, the decree schedule property has to be identified and delivered to the decree holder. I think the decision rendered by the Court below does not suffer from any serious infirmity on that ground also. Therefore, by the foregoing decisions I hold that the execution petition is maintainable and that the order passed by the Court below does not suffer from any serious infirmity and further that the writ petition cannot be entertained. Therefore, the writ petition as well as the CRP are dismissed.

M.N. KRISHNAN, JUDGE.

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